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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Plaintiff* v. US DEPARTMENT OF THE INTERIOR, *et al.*, *Defendants, and* STATE OF UTAH *Defendant-Intervenor.*	Case No. 4:21-cv-344-JSW Related Cases: 4:21-cv-561-JSW 4:21-cv-349-JSW **STATE OF UTAH'S REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** Honorable Judge Jeffery S. White Hearing Date: November 12, 2021 Time: 9:00 a.m. Place: Courtroom 5 1301 Clay Street, Oakland, CA

Defendant-Intervenor, State of Utah ("Utah"), by and through above-referenced counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully submits the following Reply Memorandum in Support of Cross-Motion for Summary Judgment.

INTRODUCTION

As discussed at length in Utah's initial memorandum, and throughout the Federal Defendants' briefing, the Fish and Wildlife Service ("FWS") went to great lengths to evaluate management plans and regulatory mechanisms outside the Great Lake States, particularly in the states of Utah and Colorado (referred to collectively as the "Central Rockies"), before issuing the 2020 Delisting Rule. Plaintiffs conveniently ignore that evaluation and instead argue, without basis, that the Federal Defendants failed to evaluate the efficacy of those mechanisms and the State of Utah failed to explain how FWS met those standards. This is simply inaccurate, and it turns the notion of state sovereignty on its head. Neither the State of Utah nor the State of Colorado have established wolf populations. At best, those states currently have disbursing wolves that have migrated from nearby states. And yet, both states have regulatory mechanisms and/or state-specific plans designed to conserve and protect wolves after delisting and after they have established in the states, each of which were evaluated in the Delisting Rule.

Plaintiffs assert there was no such evaluation and/or that the plans were inadequate because they did not set population minimums or were not legally enforceable. This is both a misinterpretation of the law and a blatant disregard for the work Utah has done to prepare for wolves. While population minimums may be a factor for FWS to consider, they are not required to establish adequate regulatory mechanisms, particularly in a state where there are no established populations to begin with. Moreover, Utah has legally enforceable mechanisms to ensure wolves within its borders are not killed and a robust plan for ensuring their conservation when they do arrive. Plaintiffs' allegations as to the effectiveness of these mechanisms is rank speculation and they simply ignore the effort Utah has put forth to save and protect all wildlife within its borders.

ARGUMENT

1. Plaintiffs' Opposition misinterprets the law and blatantly disregards Utah's Wolf Management Plan and the related regulatory mechanisms.

Regarding state-specific regulatory mechanisms, Plaintiffs attempt to overcome what is necessarily a judgment call by the FWS to impose regulations beyond what is required by the ESA and accompanying case law. As articulated in *Zinke*, "nothing in the ESA demands" legally binding provisions in a state-specific management plan. *Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1084 (D.C. Cir. 2017). Instead, regulatory mechanisms need only be sufficiently certain, based on the participating state's incentives, to protect a species "against threats that would cause the species to be an endangered species or a threatened species." *Id.* at 1087 (internal citation omitted). This is necessarily "a quintessential judgment call that Congress left to the Secretary, and by delegation to the Service, which has years of experience in evaluating what is reasonably likely to be implemented and effective." *Id.* at 1083. Moreover, "the Endangered Species Act tasks the Service with determining whether the species is endangered or threatened, not whether the species could reach still higher population levels if given more protection." *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 611-12 (D.C. Cir. 2017). In other words, the FWS must evaluate the plans to determine whether any inadequacies cause gray wolves to meet the definition of a threatened or endangered species.

Plaintiffs ignore this standard, arguing in their Opposition that the Federal Defendants failed to determine whether state-specific plans will actually "work," especially when they do not include population goals or requirements. P's Opposition, Case No. 344, Ct. Docket # 129, p. 23. However, none of the case law cited by Plaintiffs *requires* exact population goals or measurements, and no such case law exists. Indeed, Plaintiffs admit that population requirements are merely "*one of the factors* that the D.C. Circuit relied on in *Defenders of Wildlife* in concluding that adequate regulatory mechanisms existed in that case," in apparent recognition that it is not the only factor in the decision. P's Opposition, Case No. 344, Ct. Docket, # 129, p. 24 (emphasis added).

Moreover, while the court in *Defenders of Wildlife* did indeed consider population goals, it also acknowledged that *voluntary* conservation measures, when considered in conjunction with a state's incentives, can satisfy the "sufficiently certain to be implemented" standard. *Defs. of Wildlife v. Zinke*, 849 at 1084 (citing *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 6 (D.C. Cir. 2016) for the proposition that voluntary conservation measures can be sufficient). Further, the *Defenders of Wildlife* court found that "it was the general threat of human-caused mortality that required regulation in the form of binding minimum population targets by geographic area." *Id.* As discussed below and in the Delisting Rule, wolves are classified as furbearers in Utah and "take" is prohibited without a license or otherwise in violation of rules promulgated by the Utah Wildlife Board. AR_0000098. As such, the threat of human-caused mortality discussed in *Defenders of Wildlife* is simply not currently present in Utah.

Accordingly, while Plaintiffs would undoubtedly prefer population goals in every state plan, no such requirements are necessary to adhere to the "sufficiently certain" standard articulated by reviewing courts. Indeed, even the absence of conservation plans does not render a delisting decision arbitrary and capricious when wolves have not yet established in those states. *Humane Soc'y of United States v. Zinke*, 865 F.3d at 611-12 (finding the absence of conservation plans in North Dakota, South Dakota, Illinois, Iowa, Ohio, and Indiana did not render the FWS's decision to delist the WGL population arbitrary and capricious, "given the near non-existence of gray wolves within those jurisdictions.").

Furthermore, the regulatory schemes and management plans in the Central Rockies states of Utah and Colorado are sufficiently certain to ensure the protection of wolves, even without population goals. Importantly, wolves have not established themselves in Utah, even though they have been delisted in the northernmost portion of the state since 2011 and Utah borders Idaho and Wyoming, where wolves have already been deemed to have recovered.[1] Plaintiffs

[1] *See* 76 Fed. Reg. 25,590 (May 5, 2011). In Wyoming, the Service issued a delisting rule, 77 Fed. Reg. 55,530 (Sept. 10, 2012), which the district court vacated, and the appellate court reinstated. *Defenders of Wildlife v. Zinke*, 849 F.3d 1077, 1081 (D.C. Cir. 2017).

nevertheless argue that Utah's plan is inadequate because it does not have minimum population requirements and gives state wildlife managers the discretion to develop those measures in the future. In other words, Plaintiffs argue Utah's management plan will not suffice unless and until Utah arbitrarily chooses a population goal, based purely on speculation regarding their establishment in the state and without information as to how those wolves will affect other wildlife. This is not the standard, as discussed, and it ignores Utah's sovereign interest in the protection of wildlife within its borders.

Utah is uniquely qualified to determine how many wolves the state can support without causing irreversible harm to other wildlife within its borders, and it has significant interests in protecting that wildlife. For instance, Utah receives a combined total of $42,700,000 in license, permit, application, and federal aid revenue generated directly from hunting. (Reynolds Declaration, attached as Exhibit 1 to Utah's Initial Memorandum, Case No. 344, Doc. # 109, ¶ 16). That revenue is driven, in part, by the hunting of elk and deer, which will inevitably be affected by wolves as they disperse throughout the state. *See id.* at ¶¶ 17-23 (discussing how the loss of hunting revenue will affect Utah's Division of Wildlife Resources ("DWR") and how wolves are likely to disperse in the state). Utah therefore created its Management Plan to ensure that DWR has the necessary tools to effectively manage both gray wolves and ungulate species on a sustainable basis upon delisting. *Id.* at ¶¶ 25-27. Those tools are no longer available to the state if wolves are returned to federal control under the Endangered Species Act and Utah will have little ability to balance possible impacts to ungulate species and other diverse interests within the state. *Id.* at ¶ 26. Utah is therefore highly incentivized to conserve wolves that disburse into the state, to ensure it can maintain necessary control over the wildlife within its borders and balance the needs of the many competing interests within the state.

Utah fully articulated these incentives in its Wolf Management Plan, demonstrating its desire for a balanced approach to wolf management after delisting. *See* AR_36994-37000 (discussing the influence wolves will have on wildlife management and other diverse interests within the state and strategies for managing those influences). Based on the commitments made in Utah's Management Plan, and considering the incentives articulated therein, the FWS

determined Utah is "committed to conserving wolves." AR_0000056-0000057. This is not an arbitrary or capricious finding, particularly when wolves have yet to establish in the state.

Finally, Plaintiffs argue there must be added regulatory certainty in management plans outside the Great Lakes States, particularly in the Central Rockies, because the FWS's post-delisting monitoring plan does not include those states. Again, this ignores the standard the FWS must follow when evaluating state-specific plans, as discussed above. Additionally, although the FWS's post-delisting plan may not include monitoring of wolves in the Central Rockies, FWS is statutorily obligated to continue to consider the species as a whole and maintains power to reconsider any listing decision based on changed circumstances. *See* 16 U.S.C.A. § 1533. The FWS therefore has the authority to consider relisting in the event any action in the Central Rockies could potentially render the species endangered.

Perhaps more importantly though, Plaintiffs ignore the regulatory certainty that currently exist in Utah and Colorado, which prevents the "taking" of wolves. First, the Delisting Rule cites to Utah code sections that classify wolves as furbearers and prohibit take without a license or otherwise in violation of rules promulgated by the Wildlife Board. AR_0000098 (citing Utah Code Ann. § 23-20-0 and Utah Code Ann. § 23-18-2). Thus, any wolves disbursing into the state are protected from indiscriminate hunting/killing and subject to further protections outlined in the Wolf Management Plan. Second, as noted in the Delisting Rule, gray wolves are listed as an endangered species by Colorado and receive protection under Colorado Revised Statutes (CRS) 33-6-109, thereby making it illegal for any person to hunt, take or possess a gray wolf in the state. AR_0000097. Plaintiffs' speculation as to the efficacy of those regulations, or how they may be implemented at some future point in time, does not render the Delisting Rule arbitrary or capricious. *See, e.g.*, *Defenders of Wildlife v. Zinke*, 849 F.3d at 1087 (finding the ESA "does not mandate that regulatory mechanisms exist to protect a species from any conceivable impact"). Wolves are currently protected in Utah and will continue to be protected, on a sustainable basis, post delisting. The Delisting Rule should therefore be upheld.

CONCLUSION

FWS exercised reasoned judgment in evaluating state-specific management plans, particularly Utah's Management Plan, for conserving wolves post-delisting. The Court therefore should uphold the Delisting Rule, deny Plaintiffs' Motion for Summary Judgment, and grant FWS's Cross-Motion for Summary Judgment.

Respectfully submitted this 15th day of October 2021.

/s/ Jason L. DeForest
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